

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Unite Here Health,

Plaintiff

v.

Timothy R. Titolo, et al.,

Defendants

2:15-cv-02160-JAD-NJK

**Order Denying Motion for Default
Judgment Against Lisa Titolo**

[ECF No. 31]

Titolo Law Office and its sole owner, Timothy Titolo, cross-claim against Timothy's ex-wife and former office manager Lisa Titolo (aka Lisa Lambrecht) for contribution, indemnity, embezzlement, and intentional misrepresentation.¹ The Law Firm and Timothy allege that Lisa pilfered money from the Law Firm's client-trust account and withdrew the cash value of several life-insurance policies by forging Timothy's signature.²

The Law Firm and Timothy now move for default judgment on their cross-claims against Lisa, but they have not demonstrated their entitlement to this relief. The statutory requirements are not met for their contribution cross-claim. Default judgment is not appropriate for the embezzlement—now conversion—cross-claim because Timothy and the Law Firm have not shown that the funds that Lisa took from the trust account were their own personal property. Nor have they identified an agreement between Lisa and Timothy on which their contractual-indemnity cross-claim can stand. The only cross-claim that the movants have shown they can recover on is for intentional misrepresentation, but they have not sufficiently proven the amount of their damages for that claim. I therefore deny this motion for default judgment.

¹ ECF No. 9.

² *Id.*; ECF No. 31-1 at 108. The cross-claimants attach the transcript of Lisa's testimony at Timothy's State Bar hearing and other evidence to support facts that are not pled in the cross-complaint. I give weight to this evidence even though I do not accept some of the altered cross-claims in the moving papers. FED. R. CIV. P. 55(b)(2)(C).

Background

Lisa was an employee at the Law Firm for over twenty years until she quit in September 2014.³ Her duties included resolving the Law Firm's medical liens and paying other bills.⁴ Lisa represented to her husband that she had paid settlement funds and awards to lienholders.⁵ But she had not paid the lienholders,⁶ and she took money from the Law Firm's client-trust account without Timothy's authorization.⁷ At times, Lisa created false checks and reconciliation reports for Timothy to review and sign.⁸ She also made cash withdrawals from her husband and two daughters' whole-life insurance policies by forging Timothy's signature.⁹

Timothy and Lisa divorced in October 2014.¹⁰ At a State Bar hearing in February 2015, Lisa admitted to embezzling roughly \$665,000 from the Law Firm,¹¹ and she admitted to withdrawing money from the life-insurance policies.¹² In October 2015, Timothy and Lisa stipulated in a divorce decree that Lisa would assume all community debts, pay \$55,000 for the total amount that she withdrew from the life-insurance policies,¹³ and indemnify Timothy for any

³ ECF No. 31-1 at 94.

⁴ ECF No. 9 at 8, ¶¶ 5, 6.

⁵ *Id.* at 9, ¶ 7.

⁶ *Id.*

⁷ *Id.* at 9, ¶ 8, 9.

⁸ ECF No. 31-1 at 98–100.

⁹ *Id.* at 108.

¹⁰ ECF No. 9 at 9, ¶ 10.

¹¹ ECF No. 31-1 at 99.

¹² *Id.* at 108.

¹³ ECF No. 31-1 at 11.

1 money that he had to pay clients as a result of her unauthorized acts.¹⁴

2 The original complaint was filed by Unite Here Health (“UHH”) against Lisa, Timothy,
3 and the Law Firm for reimbursement of medical-bill payments that it made on behalf of a
4 personal-injury plaintiff whose tort lawsuit was settled—and whose settlement payment was fully
5 disbursed to the Law Firm and others—without satisfying UHH’s lien.¹⁵ Timothy and the Law
6 Firm answered UHH’s complaint and cross-claimed against Lisa.¹⁶ When Lisa did not respond
7 to the complaint or the cross-complaint, default was entered against her on both.¹⁷ UHH then
8 moved for default judgment against Lisa.¹⁸

9 I initially denied UHH’s motion without prejudice under the *Frow* doctrine because other
10 defendants whom UHH alleged were jointly and severally liable with Lisa were still defending
11 against its claims.¹⁹ UHH eventually settled with those other defendants,²⁰ and I entered default
12 judgment in favor of UHH on its lien claim against Lisa.²¹ In the same order, default was again
13 ordered against Lisa on Timothy and the Law Firm’s cross-claims.²²

14 Timothy and the Law Firm now move for default judgment on their contribution,
15 indemnity, embezzlement, and intentional misrepresentation cross-claims against Lisa. Timothy
16

17 ¹⁴ ECF No. 9 at 9, ¶¶ 11, 12, 13.

18 ¹⁵ ECF No. 1.

19 ¹⁶ ECF No. 9.

20 ¹⁷ ECF No. 11; ECF No. 21.

21 ¹⁸ ECF No. 18.

22 ¹⁹ ECF No. 21.

23 ²⁰ The claims against the other defendants were dismissed under FRCP 41(a)(1)(A)(ii). ECF No.
24 24.

25 ²¹ ECF No. 28.

26 ²² *Id.* I ordered the entry of default against Lisa in June 2016, but the Clerk of Court erroneously
27 entered default judgment instead. See ECF No. 22.
28

1 previously estimated that his ex-wife had taken \$1,268,338 from him and the Law Firm.²³ But
 2 after obtaining an opinion from an investigator at the Las Vegas Metropolitan Police Department,
 3 the cross-claimants now believe that they have been damaged in a lesser amount.²⁴ The Law
 4 Firm seeks \$249,115.23 for the amount that Lisa allegedly took from the trust account, and
 5 Timothy seeks \$129,255 for the amount that she allegedly withdrew from the life-insurance
 6 policies.

7 Discussion

8 A. Default judgment standards

9 Federal Rule of Civil Procedure 55(b)(2) permits a cross-claimant to obtain default
 10 judgment after default is entered based on a cross-defendant's failure to defend. After entry of
 11 default, the cross-complaint's factual allegations are taken as true, except those relating to
 12 damages.²⁵ "[N]ecessary facts not contained in the pleadings, and claims [that] are legally
 13 insufficient, are not established by default."²⁶ The court has the power to require a cross-
 14 claimant to provide additional proof of facts or damages in order to ensure that the requested
 15 relief is appropriate.²⁷ Whether to grant a motion for default judgment lies within my
 16 discretion,²⁸ which is guided by the seven factors outlined by the Ninth Circuit in *Eitel v.*
 17 *McCool*:

18 (1) the possibility of prejudice to the [cross-claimant]; (2) the
 19 merits of [cross-claimants'] substantive [cross-]claim[s]; (3)
 20 sufficiency of the [cross-]complaint; (4) the sum of money at stake

21 ²³ ECF No. 26 at 4, ¶ 12.

22 ²⁴ ECF No. 31 at 4.

23 ²⁵ *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987) (per curiam); FED. R.
 24 CIV. P. 8(b)(6) ("An allegation—other than one relating to the amount of damages—is admitted
 25 if a responsive pleading is required and the allegation is not denied.").

26 ²⁶ *Cripps v. Life Ins. Co.*, 980 F.2d 1261, 1267 (9th Cir. 1992).

27 ²⁷ See FED. R. CIV. P. 55(b)(2).

28 ²⁸ *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986).

in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was due to excusable neglect; and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.²⁹

Default judgment is generally disfavored because “[c]ases should be decided upon their merits whenever reasonably possible.”³⁰

B. Analyzing the *Eitel* factors

1. Possibility of prejudice to cross-claimants

The first *Eitel* factor weighs in favor of granting default judgment against Lisa. Timothy and the Law Firm pursued their cross-claims against Lisa to recover for the damages that her acts caused them. Lisa has failed to participate in this case despite UHH’s and the cross-claimants’ attempts to include her by serving her with process—she was served with the original complaint, cross-complaint, and summonses for both nearly a year and a half ago. Lisa’s refusal to participate compounds the cross-claimants’ injuries by requiring them to expend additional resources litigating uncontested issues: like that Lisa admittedly embezzled money from the Law Firm and fraudulently withdrew money from the life-insurance policies. Without a judgment against Lisa, Timothy and the Law Firm have no other recourse for the harm that Lisa caused them.

2. Substantive merits and sufficiency of the cross-claims

The second and third *Eitel* factors require the cross-claimants to demonstrate that they have stated a cross-claim on which they may recover.³¹ Timothy and the Law Firm move for default judgment on their cross-claims against Lisa for contribution, embezzlement, indemnity, and intentional misrepresentation. The only claim that cross-claimants have demonstrated that they can recover against Lisa on is their claim for intentional misrepresentation.

²⁹ *Id.* at 1471–72.

³⁰ *Id.* at 1472.

³¹ *See Danning v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978).

1 *a. Contribution*

2 Timothy and the Law Firm argue that their cross-claim for contribution “arise[s] out of
3 Lisa’s express agreement to indemnify Mr. Titolo for their community debt and to reimburse him
4 for monies paid to clients due to Lisa’s unauthorized access of the Law Firm Account.”³² But
5 that is not what they pled in their cross-complaint. Their cross-claim seeks equitable
6 contribution, not contractual (express) contribution, and it is limited to contribution for payments
7 made on UHH’s claims against the joint tortfeasors in this action.³³ Because “default judgment
8 in part turns on notice to the default[ed] defendant[,]”³⁴ I limit my analysis to what was pled.

9 “Contribution is a creature of statute”³⁵ “Under the Nevada statutory formulation,
10 the remedy of contribution allows one tortfeasor to extinguish joint liabilities through payment to
11 the injured party, and then seek partial reimbursement from a joint tortfeasor for sums paid in
12 excess of the settling or discharging tortfeasor’s equitable share of the common liability.”³⁶ “A
13 tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from
14 another tortfeasor whose liability . . . is not extinguished by settlement.”³⁷ Thus, “[a] tortfeasor
15 seeking to perfect a contribution [cross-]claim through a prejudgment settlement process must
16 pay an amount in excess of his equitable share of the liability **and must explicitly** extinguish the
17

18 _____
19 ³² ECF No. 31 at 9.

20 ³³ ECF No. 9 at 10, ¶ 18 (averring that, “[i]f the Cross-Claimants are determined to be jointly or
21 severally liable in tort for any injury to Plaintiff in the underlying action, Cross-Claimants are
22 entitled to contribution from Cross-Defendant in the amount of her equitable share of the entire
liability by virtue of her acts and/or omissions”).

23 ³⁴ *Wilens v. Doe Defendant No. 1*, 2015 WL 5606238, at *12 (N.D. Cal. Jul. 31, 2015)
24 (unpublished); *c.f. Fair Housing of Marin v. Combs*, 285 F.3d 899, 906 (9th Cir. 2002) (only
25 “well-pled allegations in the complaint regarding liability are deemed true”).

26 ³⁵ *Doctors Co. v. Vincent*, 98 P.3d 681, 686 (Nev. 2004).

27 ³⁶ *Id.*

28 ³⁷ Nev. Rev. Stat. § 17.225(3).

1 liability of the joint tortfeasor.”³⁸

2 It does not appear that Timothy or the Law Firm extinguished Lisa’s liability when they
3 settled with UHH. After UHH settled its claims against Timothy and the Law Firm,³⁹ it sought
4 and obtained default judgment against Lisa.⁴⁰ UHH focused its default-judgment motion on its
5 claims against Lisa for conversion and unjust enrichment⁴¹—claims that UHH also alleged
6 against Timothy and the Law Firm.⁴² Thus, Timothy and the Law Firm have not demonstrated
7 that they can recover against Lisa on their cross-claim for contribution.

8 ***b. Embezzlement***

9 Timothy and the Law Firm argue that their cross-claim for conversion seeks funds that
10 Lisa took from the Law Firm’s client-trust and operating accounts and from the family’s life-
11 insurance policies.⁴³ Although this claim is entitled “embezzlement,” I agree that it reads more
12 like a conversion claim.⁴⁴ But I do not agree that, as pled, their cross-claim seeks damages
13 suffered from Lisa’s withdrawals from the life-insurance policies or from the Law Firm’s
14 operating account.⁴⁵ Once again, I limit my analysis to the cross-claim as it is pled.

15 Conversion is “a distinct act of dominion wrongfully exerted over another’s personal
16 property in denial of[] or inconsistent with his title or rights therein *or* in derogation, exclusion,

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18 ³⁸ *Doctors Co.*, 98 P.3d at 686.

19 ³⁹ ECF No. 24 at 1, ¶ 1.

20 ⁴⁰ ECF Nos. 25 (motion for default judgment), 28 (order granting motion), 29 (default judgment).

21 ⁴¹ ECF No. 18 at 5. For law and argument, UHH’s renewed motion for default judgment referred
22 the court back to UHH’s original motion. ECF No. 25 at 2.

23 ⁴² ECF No. 1 at ¶¶ 25–38.

24 ⁴³ ECF No. 31 at 10.

25 ⁴⁴ *See* ECF No. 9 at ¶¶ 23–27. Embezzlement is a criminal charge, not a civil claim in Nevada.
26 *See* Nev. Rev. Stat. § 205.300.

27 ⁴⁵ *See* ECF No. 9 at 11–12, ¶¶ 23–27 (discussing only the funds that Lisa took from the Law
28 Firm’s client-trust account).

or defiance of such title or rights.”⁴⁶ The Law Firm’s conversion claim is complicated because it is limited to funds that Lisa allegedly took from the Law Firm’s client-trust account. “In order to keep clients’ money separated, a lawyer traditionally maintains a trust account separate from the law firm account, and keeps clients’ money in the trust account.”⁴⁷ That is precisely what the Law Firm pleads “was . . . the purpose” of this account—for “holding monies belonging to the client or other persons to whom the Law Firm any owe duties.”⁴⁸ Funds in the client-trust account do not appear to be the cross-claimants’ personal property, and the cross-claimants do not plead or otherwise establish what right or title they had to the funds that Lisa took from that account. Timothy and the Law Firm have not, therefore, demonstrated that they can recover against Lisa on their cross-claim for conversion.

c. Indemnity

Timothy and the Law Firm’s second cross-claim alleges that Lisa is liable in equity and in contract to indemnify them for any judgment entered against them on UHH’s claims in this case.⁴⁹ They move for default judgment on the contractual-indemnity portion of their cross-claim.⁵⁰ “Contractual indemnity is where, pursuant to a contractual provision, two parties agree that one party will reimburse the other party for liability resulting from the former’s work.”⁵¹

⁴⁶ *M.C. Multi-Family Dev., L.L.C. v. Crestdale Assoc., Ltd.*, 193 P.3d 536, 542 (Nev. 2008) (quotation marks and quoted reference omitted).

⁴⁷ *Washington Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 867 (9th Cir. 2001); accord Nev. R. Prof. Conduct 1.5 (requiring lawyers to “hold funds . . . of clients or third persons that is in a lawyer’s possession in connection with a representation separate from the lawyer’s own property” in “one or more identifiable bank accounts designated as a trust account maintained in the state where the lawyer’s office is situated”).

⁴⁸ ECF No. 9 at 11, ¶ 25.

⁴⁹ *Id.* at 10–11, ¶¶ 19–22.

⁵⁰ See ECF No. 31 at 9.

⁵¹ *George L. Brown Ins. v. Star Ins. Co.*, 237 P.3d 92, 96 (Nev. 2010) (quotation marks and quoted reference omitted).

1 The cross-claimants' allegations do not fit into the contractual-indemnity framework.

2 The first problem is that the cross-claimants singularly rely on a divorce decree entered by
 3 a Nevada state court.⁵² "Generally, when the district court approves and adopts the parties'
 4 agreement into the decree of divorce, the agreement merges into the decree unless both the
 5 decree and the agreement contain a clear and direct expression that the agreement will survive
 6 the decree."⁵³ "[W]hen an agreement is merged into a decree of divorce, it loses its character as
 7 an independent agreement and the parties' rights 'rest solely upon the decree.'"⁵⁴ This divorce
 8 decree does not contain clear and direct expression that the agreement, if there was one,⁵⁵
 9 survives the decree.

10 Another problem is the gulf between what the cross-claimants seek to be indemnified
 11 for—payments that they made on UHH's claims in this case—and what the state court decreed.
 12 The state court decreed that Lisa will "assume all community debts of the parties other than those
 13 set forth herein" and she will "indemnify and hold [Timothy] harmless from said community
 14 debts."⁵⁶ The cross-claimants do not allege, and have not otherwise established, that payments
 15 made on UHH's claims in this case were a community debt. The decree further orders that Lisa
 16 "is required to reimburse [Timothy] for any monies [that] [Timothy] must pay to clients because
 17 of the defalcations by [Lisa] of clients' monies from [Timothy's] Attorney Trust Account[,]
 18 which was assessed by [Lisa] without [Timothy's] permission."⁵⁷ But UHH was not the Law
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21 ⁵² ECF No. 9 at 9, ¶¶ 12–13.

22 ⁵³ *Mizrachi v. Mizrachi*, 385 P.3d 982, 988 n.9 (Nev. 2016).

23 ⁵⁴ *Mizrachi*, 385 P.3d at 988 n.9 (quoting *Day v. Day*, 395 P.2d 321, 322 (Nev. 1964)).

24 ⁵⁵ The decree states that Lisa and Timothy "stipulated" to its contents, but it does not reference
 25 any agreement entered into between them. ECF No. 31-1 at 8.

26 ⁵⁶ ECF No. 31-1 at 10.

27 ⁵⁷ *Id.*

1 Firm's client; it was the lienholder of one of the Law Firm's clients.⁵⁸ Thus, Timothy and the
 2 Law Firm have not demonstrated that they can recover against Lisa on their claim for contractual
 3 indemnity.

4 ***d. Intentional misrepresentation***

5 Timothy and the Law Firm lastly argue that they have sufficiently pled and established
 6 that they are entitled to recover on their cross-claim for intentional misrepresentation against Lisa
 7 for the funds that she took from the Law Firm's client-trust account.⁵⁹ To prevail on a claim for
 8 intentional misrepresentation, a cross-claimant must demonstrate: (1) that cross-defendant made
 9 a false representation; (2) the cross-defendant knew or believed that her representation was false
 10 or had an insufficient basis for making the representation; (3) the cross-defendant intended to
 11 induce the cross-claimant to act or refrain from action upon the misrepresentation; and (4) the
 12 cross-claimant was damaged as a result of relying on the misrepresentation.⁶⁰

13 The cross-complaint sufficiently sets forth an intentional-misrepresentation cross-claim
 14 against Lisa under Rule 8's liberal pleading standard. The cross-claimants allege that Lisa falsely
 15 represented to Timothy that she had paid lienholders. They provide the transcript of a hearing
 16 before the Nevada State Bar where Lisa admits that she forged checks for Timothy to sign and
 17 falsified reconciliation reports for him to review.⁶¹ It can reasonably be inferred from the
 18 allegations and evidence that Lisa intended the false reports and forged checks to prevent
 19 Timothy from discovering and stopping Lisa's fraud.⁶² Timothy and the Law Firm allege that

21 ⁵⁸ See ECF No. 1 at ¶ 3.

22 ⁵⁹ ECF No. 31 at 10–11.

24 ⁶⁰ *Barmettler v. Reno Air, Inc.*, 956 P.2d 1382, 1386 (Nev. 1998).

25 ⁶¹ ECF No. 31-1 at 98–100.

26 ⁶² See *Lopez v. Javier Corral, D.C.*, 2010 WL 5541115, at *4 (Nev. Dec. 20, 2010) (holding that a
 27 defendant's use of a stamp falsely stating that a debt to a plaintiff had been full paid "intended to
 28 induce [the plaintiff] to act, or refrain from acting, to preclude [the plaintiff] from receiving the
 full benefit of his contract").

1 they were damaged as a result of relying on Lisa's misrepresentations: they were sued by UHH
 2 and face liability to clients and other lienholders whose funds Lisa took from the client-trust
 3 account. Accepting these factual allegations as true, as I must in deciding a motion for default
 4 judgment, and examining the evidence provided, I find that Timothy and the Law Firm have pled
 5 and proved their cross-claim against Lisa for intentional misrepresentation. Because it is the only
 6 cross-claim that Timothy and the Law Firm have pled and proved, I limit my analysis of the
 7 remaining *Eitel* factors to this claim.

8 **3. Amount at stake**

9 The third *Eitel* factor "requires that the court assess whether the recovery sought is
 10 proportional to the harm caused by [cross-]defendant's conduct."⁶³ Cross-claimants seek to
 11 recover \$249,115.23 for Lisa's withdrawals from several of the Law Firm's accounts. This
 12 amount is plainly significant, but I find that it is reasonable when balanced against Lisa's
 13 conduct, which includes potentially criminal embezzlement and intentional misrepresentation.
 14 So long as the cross-claimants can prove their entitlement to these damages, the amount is
 15 reasonable in light of the circumstances of this case.

16 **4. Possibility of dispute**

17 Under the next *Eitel* factor, I consider the possibility that material facts are disputed.
 18 Cross-claimants have adequately alleged intentional misrepresentation against Lisa. To support
 19 their cross-claim, they provide a divorce decree, a State Bar hearing transcript, and several
 20 affidavits. The facts in the cross-complaint are presumed true and are supported by evidence in
 21 the record. Further, Lisa has failed to oppose the motion. Thus, no factual disputes exist that
 22 would preclude the entry of default judgment against her.

23 **5. Possibility of excusable neglect**

24 The seventh *Eitel* factor requires me to consider whether Lisa's default may have resulted
 25 from excusable neglect. Despite being served with demand letters and process, Lisa never
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27 ⁶³ *Landstar Ranger, Inc. v. Parth Enterprises, Inc.*, 725 F. Supp. 2d 916, 921 (C.D. Cal. 2010)
 28 (citation omitted).

1 appeared in this lawsuit. There is no evidence that Lisa’s default is the product of excusable
2 neglect.

3 **6. Policy for deciding cases on the merits**

4 Lisa’s failure to appear in this action renders a decision on the merits in this case
5 “impractical, if not impossible.”⁶⁴ She was served with the original complaint and summons over
6 a year and a half ago, and she was served with the cross-complaint and summons nearly sixteen
7 months ago.⁶⁵ She has yet to respond to these pleadings in any way. Entry of default judgment is
8 therefore appropriate on this factor.

9 **C. Character and amount of award against Lisa**

10 The cross-claimants have not provided sufficient evidence of the amount that Lisa
11 withdrew from the client-trust account for me to calculate the damages on this claim. Lisa
12 admitted to embezzling \$665,000 from the Law Firm at the State Bar hearing. The cross-
13 claimants previously argued that Lisa was liable for taking \$1,268,338 from the trust account and
14 insurance policies. The cross-claimants are now seeking \$249,115.23 for the withdrawals from
15 the trust account.⁶⁶ They argue that their new damage amount is based on an opinion from the
16 Las Vegas Metropolitan Police Department, but they fail to attach the opinion to their moving
17 papers. I cannot properly assess the cross-claimants’ damages without reviewing the (properly
18 authenticated) opinion on which it is based.

19 **Conclusion**

20 Accordingly, IT IS HEREBY ORDERED that **cross-claimants’ motion for default**
21 **judgment [ECF No. 31] is DENIED without prejudice** to the filing of a renewed motion that
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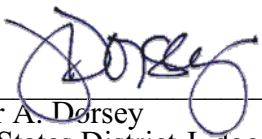
25 ⁶⁴ See *PepsiCo, Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1177 (C.D. Cal. 2002).

26 ⁶⁵ ECF No. 12.

27 ⁶⁶ Timothy now seeks \$129,255 for the withdrawals from the life-insurance policies—even
28 though the divorce decree orders that Lisa owes only \$55,000 for those withdrawals.

1 cures the defects in the prior motion within 10 days.

2 DATED: July 21, 2017

3 
4 Jennifer A. Dorsey
United States District Judge